United States Department of Labor
Employees' Compensation Appeals Board

HOWARD M. FAVERMAN, Appellant	)	
and	)	**Docket No. 05-1496**
	)	**Issued: October 19, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Howard M. Faverman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On June 27, 2005 appellant filed an appeal of the July 16, 2004 and March 28, 2005 merit decisions of the Office of Workers Compensation Programs' denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury on May 7, 2004 while in the performance of duty.

FACTUAL HISTORY

On May 12, 2004 appellant, a 60-year-old taxpayer resolution representative, filed a traumatic injury claim, alleging that on May 7, 2004 he sustained injuries to his nose, tailbone, left shoulder and neck when he crashed into a wall and fell to the floor 55 minutes before his shift began. He stated that he was heading to the cafeteria after having used the men's room

when the accident occurred. Appellant's supervisor contended that the injury did not occur in the performance of duty in that it occurred at 7:20 a.m., 55 minutes before his regular shift began at 8:15 a.m.

Appellant submitted a report dated May 17, 2004 from Dr. Bonnie Southworth, a Board-certified internist, reflecting that she examined appellant on May 7, 2004 after he fell at work. She stated that he sustained head trauma, which caused postconcussive syndrome and a skeletal injury, which caused left neck and back discomfort. She indicated that a cervical spine film showed retrolisthesis of C3-L4, producing an unstable cervical spine, but that it was unclear whether the condition was due to his fall or from chronic degenerative joint disease or both.

A report of occupational injury form dated May 11, 2004 and signed by appellant's supervisor and safety officer indicated that a coworker, Nadia Rezzouki, saw appellant hit the wall with his face and fall backward to the ground.

In a May 21, 2004 memorandum, manager Maerita McDermott stated that appellant's tour of duty was Monday through Friday from 8:15 a.m. to 4:45 p.m. and that his office was on the ninth floor. She further indicated that, on the date of injury, she had not directed appellant to perform services for the employing establishment prior to his normal tour of duty and that he was not scheduled to work credit hours or overtime. Ms. McDermott reported that when she asked him why he was on the second floor prior to his tour of duty, appellant stated that he had used the men's room and intended to return to his office.

By letter dated May 26, 2004, the employing establishment officially challenged appellant's claim, contending that, although the injury occurred on the employing establishment's premises, it did not occur during appellant's normal work hours as a regular incident of employment and no substantial benefit to the employing establishment had been shown as a result of appellant's presence on the premises.

By letter dated June 10, 2004, the Office advised appellant that the information submitted was insufficient to establish his claim and requested additional information regarding his activities at the time of injury and a physician's narrative medical report with a firm diagnosis.

Appellant submitted a position description for a tax resolution representative and a May 28, 2004 pathology report reflecting "marked spondylosis with multilevel moderate to severe canal and neural foraminal stenosis." Appellant provided medical reports and notes signed by Dr. Southworth dated June 10 and 14 and July 1, 2004, reflecting that appellant continued to experience pain in his neck and back, as well as headaches and difficulty concentrating. In an unsigned note dated May 7, 2004, Dr. Philip Rice, a Board-certified thoracic surgeon, provided a diagnosis of nasal bridge laceration secondary to fall.

In a July 5, 2004 narrative statement, appellant claimed that due to his severe visual impairment, his physician had instructed him to take "The Ride" to work, which he described as a shared ride for qualified individuals, that though the pick-up and delivery times were not precise, he usually arrived at work between 7:05 a.m. and 8:05 a.m., that on May 7, 2004 appellant arrived at work at 7:15 a.m., that he used the bathroom facilities on the second floor "as it is better equipped," that he heard a noise as he exited the lavatory; that he turned around, hit

the wall and fell to the floor. Appellant reported that he cut his nose and injured his head, neck and left shoulder when he landed on his back.

By decision dated July 16, 2004, the Office denied appellant's claim, finding that he had arrived early for work for personal reasons; that his presence was not required as a condition of employment; that there had been no substantial employer benefit as a result of his presence; and that he had not been involved in any preparatory activity reasonably incidental to employment activities on the morning of the injury.

Appellant submitted a report dated October 7, 2004 from Dr. Roberto Pineda, a Board-certified ophthalmologist. Dr. Pineda stated that appellant had a history of progressive visual loss due to hereditary retinal degeneration, was considered to be legally blind and should be entitled to receive any benefits related to his medical status.

On January 9, 2005, appellant submitted a request for reconsideration. In an accompanying narrative statement, appellant claimed that he regularly arrived at work early because he needed extra time to prepare for the day's activities. Appellant contended that he was not in full control of his time due to his form of transportation and, therefore, he arrived at work as early as possible. He stated that he was "certainly involved in preparatory activity incidental to [his] employment and [was] absolutely doing [his] master's business."

By decision dated March 28, 2005, the Office denied modification of its July 16, 2004 decision, finding that there was no evidence that appellant's presence at the time of the accident was required as a condition of his employment and that a one-hour interval between arrival and the commencement of a tour of duty is not considered to be reasonable.

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment." The phrase "course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance.[2]

In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his employer's business; (2) at a place where he may reasonably be expected to be in connection

[1] *See* 5 U.S.C. § 8102(a).

[2] *See Annie L. Ivey*, 55 ECAB ___ (Docket No. 02-1855, issued April 29, 2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[4] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in preparatory or incidental acts. However, presence at the employing establishment's premises during work hours or a reasonable period before or after a duty shift is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury "arising out of the employment." This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[5]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective."[6]

ANALYSIS

The injury in this case occurred on the premises of the employing establishment. However, this factor alone is not sufficient to establish entitlement to benefits for compensability, as the concomitant requirement of an injury "arising out of the employment" must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[7] In order for an injury to be considered as "arising out of the employment," the facts of the case must show some "substantial

[3] *Id.*

[4] *See James P. Schilling*, 54 ECAB ___ (Docket No. 03-914, issued June 20, 2000); *see also Narbik A. Karamian*, 40 ECAB 617 (1989).

[5] *See Eileen R. Gibbons*, 52 ECAB 209 (2001). *See also Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[6] *Rebecca LeMaster*, 50 ECAB 254 (1999).

[7] *Narbik A. Karamian*, *supra* note 4.

employer benefit or requirement" which gave rise to the injury.[8] It is incumbent upon appellant to establish that it arose out of his employment. In other words, some contributing or causal employment factor must be established.

The Board finds that, in the present case, appellant was on the employing establishment premises solely for personal reasons. Appellant gave conflicting reasons for routinely arriving to work early. In his July 5, 2004 narrative, he stated that due to a visual impairment, he took "The Ride" to work and that though pick-up and delivery times were not precise, he usually arrived between 7:05 a.m. and 8:05 a.m. In a January 9, 2005 statement, appellant alleged that he arrived at work early because he needed extra time to prepare for the daily activities. The Board notes that appellant did not identify any specific preparatory or incidental activity related to his employment that required him to be present 55 minutes before his tour of duty began. In fact, the record reflects that appellant had stopped on the second floor to use the men's room because it was better equipped and was headed to the employee cafeteria when the accident occurred.

What constitutes a reasonable interval before his work shift began depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity.[9] Ms. McDermott reported that, on the date of the injury, she had not directed appellant to perform services for the employing establishment prior to his normal tour of duty and that appellant was not scheduled to work credit hours or overtime. The Board, furthermore, notes that appellant's own statements do not contradict this representation. Additionally, there is no evidence that the employing establishment expressly or impliedly required appellant's presence on the premises prior to his official hours. Nor is there evidence that appellant made his supervisor aware that his condition required him to be on the premises prior to his official hours in order to prepare for his daily activities. Accordingly, the Board finds that appellant's presence on the premises 55 minutes prior to the commencement of his tour of duty on the morning of the accident was not reasonable.

Appellant's arrival at the employing establishment prior to official starting time does not automatically place his activities outside the scope of the employment.[10] However, his activity prior to work on May 7, 2004 did not further his master's business, or provide a substantial benefit to the employer. Appellant's presence on the premises at the time of injury was not required as a condition of his employment, nor was he involved in any preparatory activity reasonably incidental to his employment activities on the morning of the claimed injury. Only as

[8] *Catherine Callen*, 47 ECAB 192 (1995).

[9] *See Maryann Battista*, 50 ECAB 343 (1999). *See also Narbik A. Karamian*, at 618 *supra* note 4; (*citing Clayton Varner*, 37 ECAB 248 (1985)).

[10] *See James E. Chadden*, 40 ECAB 312, 315 (1988) (stating that claimant's arrival at the employing establishment a half hour prior to his official starting time was not so early as to place claimant's activity outside the scope of employment). *But cf. Nona J. Noel*, 36 ECAB 329, 331-32 (1984) (noting that an employee had stated that she arrived at the employing establishment early in order to avoid traffic congestion and finding that the act of having breakfast was not a preparatory activity reasonably incidental to the employee's work activities).

a matter of personal convenience did appellant choose to arrive at the employing establishment early.[11]

There is no evidence that appellant's injury resulted from any employment-related factors. Thus, the Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

CONCLUSION

The Board finds that appellant has not established that he sustained injury on May 7, 2004 arising in the course of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2005 and July 16, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 19, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[11] *See Timothy K. Burns*, 44 ECAB 125 (1992) (where claimant sustained injury after tripping over an elevated portion of a sidewalk on the employing establishment premises approximately 20 minutes prior to his scheduled tour of duty and while he was walking for exercise before beginning work and noted his practice of arriving early at work to avoid traffic congestion, the Board found that the employee failed to establish that his injury arose in the performance of duty as he was on the premises of the employer for purely personal reasons and not engaged in activities that could be characterized as reasonably incidental to the commencement of his work duties); *see also Nona J. Noel*, *supra* note 10 (where claimant sustained injury when she fell on a sidewalk located on the employing establishment premises and noted that she arrived at work an hour and one-half before the official starting time in order to avoid heavy traffic and to take advantage of the low cost breakfasts; the Board found that the employee's injury was not sustained while she was in the performance of duty).